STATE OF MICHIGAN
SUPREME COURT

STEPHEN W. WARDA,

Plaintiff-Appellee/Cross-Appellant,

v.

CITY COUNCIL OF THE CITY OF FLUSHING and CITY OF FLUSHING,

Defendants-Appellants/Cross-Appellees.

SUPREME COURT NO. 125561

COURT OF APPEALS NO. 241188

GENESEE COUNTY CIRCUIT COURT
CASE NO. 98-62796-CZ

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reply

DEFENDANTS-APPELLANTS' REPLY BRIEF
TO
PLAINTIFF-APPELLEE'S BRIEF IN OPPOSITION
TO
DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT

I. APPELLEE FAILED TO FULLY SET FORTH THE FACTS IN HIS COUNTER-STATEMENT OF FACTS.

Defendant/Appellants, in response to Plaintiff/Appellee's Brief opposing its Application for Leave to Appeal, seeks to clarify the facts leading to this cause of action as Appellee has failed to objectively set forth the evidence presented contrary to MCR 7.302(A)(1)(d) and MCR 7.212(C)(6). MCR 7.302(A)(1)(d) provides that the statement of material proceedings and facts must conform to MCR 7.212(C)(6). That section states that "A statement of fact must be a clear, concise, and chronological narrative. All material facts, both favorable and unfavorable, must be fairly stated without argument or bias."

Several portions of the Counter-Statement of Facts are argumentative and there is a significant misinterpretation of facts that cannot go unanswered. In his Brief in Opposition to Appellants' Application for Leave to Appeal, Appellee has stated that the City of Flushing Police Officers were "an integral part of salvage vehicle inspections," and that there were "significant connections to the City of Flushing" when Officer Warda was working in the field as a salvage vehicle inspector (Appellee's Brief, p. 5). Several portions of the Trial Transcript suggest that these statements are not substantiated. For example, throughout his testimony, the Chief of Police for the Flushing Police Department, Faye Peek, stated that the Appellee was not working for the City, but for the Secretary of State, while doing the salvage vehicle inspections: . . . "he is working for the Secretary of State's office. . ." (TT Vol. II, p. 18) . . ."it's not part of their duties as a Flushing Police Officer. . ." (TT Vol. II, p. 19). Additionally, the Chief stated that supervision of office resources was lax and that these resources were not to be used for private enterprise (TT Vol. II, p. 20, lines 11-21).

Sgt. Ward of the Flushing Police Department was also a salvage vehicle inspector at the time that Officer Warda was an inspector. In his testimony during trial, he stated that the job as salvage vehicle inspector had nothing to do with the City of Flushing (TT Vol. II, p. 59). Sgt. Ward also testified that in the ten (10) years of doing salvage vehicle inspections, he never once used any of the Flushing Police Department resources (TT Vol. II, p. 60). In light of the actual testimony at trial, Appellee's statement that the City of Flushing Police Department's officers were an integral part of the salvage vehicle inspections and that the field inspectors had significant connections to the City of Flushing Police Department is simply incorrect and not substantiated by the testimony.

Appellee has claimed that his "inspector status was solely reliant on his being a police officer at the City of Flushing" and that the City had "total control" with regard to his re-certification (Appellee's Reply Brief at p. 6-7). The evidence simply was that Appellee had to be a police officer to qualify as an inspector. His inspector status was not reliant on his being an officer with the City of Flushing, but rather he simply had to be a police officer in a Michigan municipality. The fact that he is a police officer with the City of Flushing had nothing to do with his eligibility as a salvage vehicle inspector for the State of Michigan. Additionally, the City had no control over Officer Warda's re-certification. Chief Peek testified that by signing the re-certification form, he only verified that the individual is a police officer in good standing and has expressed a wish to continue to do the vehicle inspections: "what I am saying is that he's a police officer in the City of Flushing in good standing, and that he wishes to continue to do his vehicle inspections. . .that's all that that allows." (TT Vol. II, p. 19, lines 7-10). Once again, the statements made in Appellee's Counter-Statement of Facts cannot be supported by the testimony given at trial.

Appellee has used deposition testimony from a former City Attorney, Richard Figura, to suggest that the City agreed that Appellee was within the scope and course of his employment with the City of Flushing while he was performing salvage vehicle inspections (Appellee's Brief, p. 9). Though it is true that the City Attorney, at one time, thought that Appellee was acting within the scope of his employment, Appellee has neglected to cite the complete record of Mr. Figura's statements. If the Appellee would have fairly summarized Mr. Figura's deposition, he would have included the testimony which suggested Mr. Figura's initial opinion of Appellee's employment scope and status was in error: "it was my understanding that whatever he was doing, wherever he was doing them, these were inspections that resulted from either a direction from one of his superiors or from some complaint or case that originated in the City of Flushing or it was a matter over which the Flushing Police Department had jurisdiction." (Dep. of Richard Figura, p. 36, lines 17-33). Mr. Figura later learned that this was a misunderstanding. When he had an accurate depiction of the facts, he changed his opinion as to Officer Warda's employment as a salvage vehicle inspector: ". . .I don't recall exactly when, but I can remember coming -- hitting myself in the head almost saying, oh, so he wasn't working for the city." (Dep. of Richard Figura, p. 38, lines 2-5). In his Counter-Statement of Facts, Appellee is using Mr. Figura's statements as an admission by the City that the Appellee was in the course and scope of his employment at the time he was doing salvage vehicle inspections. It is well established that "statements by counsel regarding the law cannot be treated as a party admission or be binding on the court." ***Sarin v. Samaritan Health Center***, 176 Mich. App. 790, 796; 440 NW 2d 80 (1989).

The statements by Mr. Figura were not an admission by the City nor does an accurate summarization of his deposition testimony suggest that that Appellee was in the course and scope of his employment for the City of Flushing by working as a salvage vehicle inspector.

In the same Counter-Statement of Facts, Appellee has stated that, in a Resolution dated September 8, 1997, the City "admitted that they agreed that Officer Warda was within the scope and course of his responsibilities when they indicated that reimbursement for his attorney fees is permitted but not required" (Appellee's Brief, p. 10). That is not what the Resolution on September 8, 1997 stated. In actuality, that Resolution states "while the performance of salvage vehicle inspections may have been within the scope of Mr. Warda's employment, the actions of Mr. Warda which led to the criminal prosecution were not" (Trial Exhibit 15, p. 1). This Resolution was drafted by the City attorney when under the mistaken impression that Mr. Warda was doing his inspections at the direction of the City of Flushing or because the case had originated in the City of Flushing. However, the Resolution uses the word "may" which simply is not an admission and does not concede that Mr. Warda was within the scope and course of his employment as a City of Flushing employee at the time of the vehicle inspections.

II. THE GROUNDS FOR WHICH APPELLANTS ARE SEEKING AN APPLICATION FOR LEAVE TO APPEAL ARE STATED IN THE ISSUES RAISED IN THE APPELLANT'S APPLICATION FOR LEAVE TO APPEAL.

MCR 7.302(B) states the grounds upon which one must show in order for an Application for Leave to Appeal will be considered by this Court. The issues presented and the discussions following the issues presented in Appellants' Application for Leave to Appeal clearly set forth the grounds upon which the Appellants seek Application for Leave to Appeal. Those grounds are as follows:

This is an Appeal from the decision of the Court of Appeals that is clearly erroneous and will cause material injustice and the decision conflicts with a Supreme Court decision. Additionally, these issues involve a substantial question as to the validity, interpretation and

application of a legislative act. These grounds have been stated and, therefore, the Application for Leave to Appeal is proper before the this Honorable Court.

CONCLUSION

MCR 7.212(C)(6) makes it clear that the statement of facts must be a clear, concise and chronological narrative with all the facts, both favorable and unfavorable, and must be stated without argument or bias. Clearly, in this instance, Appellee's counter-statement of fact has taken several arguments and passed them off as fact, without the support of the trial testimony or exhibits. The actual facts state that the Flushing Police Department officers have little or nothing to do with the Appellee's performance as a salvage vehicle inspector with the State of Michigan. Additionally, the facts also set forth that the City of Flushing has nothing to do with the re-certification process of a salvage vehicle inspector. Finally, the facts do not support Appellee's contention that the City has somehow admitted that the Appellee was within any course or scope of his employment at the time he did the salvage vehicle inspection that is the subject of this lawsuit. As a result of Appellee's statements and counter-statement of fact, these clarifications are necessary for this Honorable Court's consideration.

Respectfully Submitted,

HENNEKE, McKONE, FRAIM & DAWES, P.C.

Dated: March 16, 2004

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